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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME GUERRERO,

Defendant and Appellant.

D043070

(Super. Ct. No. SCN141696)

APPEAL from a judgment of the Superior Court of San Diego County,
Runston G. Maino, Judge. Reversed.

A jury convicted Jaime Guerrero of two counts of robbery (Pen. Code,¹ § 211), attempted robbery (§§ 211, 664), and assault with a semiautomatic firearm (§ 245, subd. (b)). The jury also found true that Guerrero personally used a firearm within the meaning of section 12022.53, subdivision (b) in the commission of the robberies and attempted robbery and within the meaning of section 12022.5, subdivision (a)(1) in the commission

¹ All statutory references are to the Penal Code unless otherwise specified.

of the assault. The trial court sentenced Guerrero to a total prison term of 16 years, four months.

Guerrero appeals, contending there was insufficient evidence to support all verdicts and findings, and the trial court committed prejudicial error in admitting evidence of his earlier contacts with police, in denying his motion for the admission of third party culpability evidence, and in denying his motion for a new trial. As we explain, although there is sufficient evidence to support the jury's verdicts and findings, they must be reversed because the court prejudicially erred in admitting evidence of Guerrero's earlier police contacts.

FACTUAL BACKGROUND

Around 9:00 p.m. on February 11, 2002, as Antonio Perez Martinez, an employee of El Semental Market (the market) in San Marcos, was bringing produce from outside the market inside at closing time, a man approached him from behind, grabbed his hair, put a gun to his side and commanded him in Spanish to "Go inside." Forced into the market by the man who also had an accomplice, Martinez called to his employer, the market's owner Salvador Duenas Aguilar,² to listen to the assailant who yelled, "This is a robbery." When Aguilar, who was at the counter checking out a customer, saw the gun he became frightened and walked quickly backwards and out another door. Once outside, Aguilar yelled to a group of bystanders for help.

² Aguilar was referred to as Duenas by some witnesses.

While one of them, Antonio Gutierrez, was calling "9-1-1" on a mobile telephone, back in the market the gunman pushed Martinez to the ground and ordered at gunpoint Juan Flores, the customer who had been at the counter paying for his groceries, to get down on the ground. The accomplice then demanded, "Your wallets, fuckheads," and began searching Flores's pockets and pants for a wallet. The gunman told his accomplice in Spanish, "Hurry up, cousin." At some point the robbers emptied the cash register.

As the gunman and his accomplice fled the market, both Aguilar and Gutierrez observed them go toward the back of the store. While Aguilar then went back into the market, Gutierrez saw the men run up some stairs in a nearby building. When the bigger of the two men turned to look at Gutierrez and pointed something at him, Gutierrez went to the side of the building so he would not get shot. When Gutierrez then ran to the other side of the building he saw the two men go behind a liquor store and leave in a car.

Gutierrez described the escape from the market in his phone call to the police, estimating that the larger man was about six foot one and weighed 240 pounds.

Aguilar also telephoned the police from inside the market where he found the cash register and money scattered on the floor and Martinez and Flores on the ground. Aguilar described both the robbers as heavyset and estimated the taller one was between five feet, eight inches and five feet, 10 inches tall.

San Marcos Deputy Sheriff Michael Hamerschlag, who responded to a call that the market had been robbed, took a latent fingerprint from the register drawer and separately interviewed Martinez, Flores, Aguilar and Gutierrez at the market that night. Gutierrez described both men to Hamerschlag, telling him the larger male was "six-three,

240 pounds or more, wearing a dark jacket or shirt, black beanie and dark pants," and the other person was more normal-size and he did not see his face.

Flores told Hamerschlag he saw a large, "fat" Hispanic male with a moustache, who wore a black beanie, dark blue jacket, and dark pants enter the store with the employee Martinez, who then told him to get on the ground. Flores did so after the man pointed a silver semiautomatic gun at him. Flores heard another person enter the store and felt him go through his back pockets looking for a wallet. Flores heard the larger man with the gun tell the other man, " 'Hurry up, cousin,' or 'Hurry up, primo,' which in Spanish means 'cousin.' "

Martinez told Hamerschlag the man who grabbed his hair and put a gun to his side was "a large Hispanic male [with] a goatee, wearing a black beanie, blue sweater [and] blue jeans." When they entered the market, Martinez saw another Hispanic male who had a ski mask over his face and heard him open the cash register when the larger man ordered Martinez to lay on the ground. Martinez also heard the larger male say, " 'Let's move, primo.' " Martinez believed he would be able to identify the larger of the two robbers, saying he was taller and larger than Hamerschlag who is six feet tall.

Aguilar could not really give Hamerschlag much of a description of the large Hispanic male who robbed his market with a "big white [automatic] handgun," but noted he was with a smaller Hispanic male and the two had taken between \$1,500 and \$2,000 from the market.

Hamerschlag later spoke with Sheriff's Deputy Robert Stebbing, who works in Vista and was familiar with the San Marcos area, in an effort to find out whether the

descriptions he had been given fit any people he knew. Stebbing knew of one Hispanic person larger than Hamerschlag. Based on the information about a cousin being involved, Stebbing also knew that the large Hispanic person had a cousin and forwarded to Hamerschlag both names and their dates of birth. The large person was Guerrero and the second was his younger, smaller cousin by the same name.

Hamerschlag's crime report containing this information was then provided to Benny Cruz, a detective for the San Diego County Sheriff's Department in San Marcos who was in charge of the investigation of the robbery at the market. Based on the information, Cruz pulled photographs for the two Guerreros and put them in separate photographic lineups, which he then showed separately over the next two weeks to Martinez, Flores, Aguilar and Gutierrez.

Martinez picked Guerrero's photograph out of a six-photo lineup as one of the men who had robbed the market within 30 seconds and without hesitation. Aguilar picked out Guerrero from the lineup immediately, and Flores did so after several minutes. Gutierrez was "not very sure, but" thought Guerrero's photograph in the lineup looked like one of the robbers and said " '[t]he guy was built like a bear.' " Gutierrez also viewed the second lineup and thought the other robber looked like one of two photographs, one of which was Guerrero's cousin.

Aware of the information Guerrero had been identified as one of the market's robbers, Stebbing arrested him as he drove his car in Vista, California on February 22, 2002.

In addition to the above evidence being admitted at trial, Martinez, Flores and Aguilar identified Guerrero in court as the large Hispanic male who had robbed the market. In doing so, each explained his opportunity to see the robber's face and endured lengthy cross-examination which pointed out all the conflicts in each witnesses various identifications before and during trial. Gutierrez testified Guerrero "could be" the robber with the gun, but was not certain.

A fingerprint expert testified the latent print taken from the cash draw was unusable and Stebbing further testified that he had personally known Guerrero and his cousin for three or four years and had seen them in Vista three years earlier in a Dairy Queen located about four or five miles from the market. Stebbing noted that when he arrested Guerrero he obtained information from him showing he was six-foot, four inches tall, weighed 280 pounds, and lived in Vista at an address about six miles from the market.

Over Guerrero's objection, four deputy sheriffs then testified about earlier contacts with him in San Marcos, i.e., on March 11, 1993, at an apartment; on May 9, 1997, at 9:10 p.m.; on May 20, 1997, at Bradley Park; and on October 2, 2001, at his car in a parking lot of a hotel. An investigator testified the locations of these contacts were within 2.6 miles of the market and at most five minutes driving distance away.

In his defense, Guerrero called two men who testified that his cousin may have been working 350 miles from San Marcos in Hanford, California at the time of the market robbery. Guerrero's girlfriend also testified, essentially stating that she could not specifically remember whether Guerrero had been with her at 9:00 p.m. on Monday

night, February 11, 2002, but he probably was with her because they always watched a television movie together at that time during the week.

DISCUSSION

I

EVIDENCE OF EARLIER POLICE CONTACTS

In limine, Guerrero moved to exclude evidence of his prior contacts with police in San Marcos as irrelevant and highly prejudicial because such would imply a history of illegal conduct. The prosecutor sought to admit the same evidence to prove Guerrero's knowledge of the area where the robbery occurred, arguing a jury could infer from such evidence that someone who knows the area of the market "would more likely . . . be the perpetrator[] of the robbery th[a]n someone who does not have such knowledge," and that any prejudice could be prevented by instructing the jury that the evidence of the earlier police contacts was limited to such knowledge.

At the hearing on the matter the court expressed its "feeling" that the evidence of Guerrero's prior contacts with the police was "very relevant to where the defendant lives; how long he's lived in the area; where this address that he lived at is in relation to where the robbery took place; how long he's been in the area." The court stated it would tentatively permit the prosecutor to bring in the police officers to testify they had contacts with Guerrero "in certain areas and certain times and certain locations," and "would be willing to give at the time the testimony comes in a limiting instruction it's not admitted to show that either he's a good person by being a witness to a crime or victim or a bad person by being contacted by the police."

Guerrero's counsel thought the main prejudice with the admission of such evidence was that "a jury is going to be told that again and again and again and again . . . Guerrero had come in contact with the police. That's all they need to hear for them to get the prejudice of that. It doesn't matter how sanitized it is, they're going to hear again and again and again; so . . . the jury can only come to the conclusion, regardless of how much you admonish them not to, that he is in trouble with the police because the police don't generally come up and talk to your average citizen. . . . And it's a circumstance where most people, the only time they're coming in contact with the police is when they get pulled over or if they are a victim of some crime. They don't come in contact with them and have some sort of a conversation that leads to them knowing who they are, identifying them, and interviewing them or anything else so such that it would be documented and remembered 10 years later."

Defense counsel also thought it was highly prejudicial the way the prosecutor proposed to prove Guerrero's knowledge of San Marcos because the court could just take judicial notice of the fact that Guerrero had attended junior high and high school in San Marcos and had lived in the area for a number of years. Counsel also thought the police contact evidence was irrelevant because "there's not going to be any dispute about where [Guerrero] lives or him . . . either knowing or not knowing the area."

The court suggested defense counsel try to work out a stipulation for the evidence with the prosecutor because the court thought Guerrero's knowledge of the area was relevant as to "how the crime might occur, when it might occur, how one might get into the store and then out of the store without being caught. . . . Either you case a joint, if

you are not familiar with it; or if you are familiar with it, you don't have to do that little step and charge right ahead."

The prosecutor thought the previous contacts were not so egregious that if the jury knew they were for minor incidents the prejudice of the "unknown" which the defense worried about would not be present. When the court agreed the earlier contacts were "really innocuous," defense counsel complained it was the combined effect such evidence would have that was prejudicial. The court overruled the objections and stated it would allow the evidence Guerrero had been contacted "at certain places at certain times; where that is in relationship to where he lives and where he is in relationship to where the robbery occurred."

Later during trial, defense counsel again raised an objection to the admission of the proposed evidence of police contacts via the testimony of various police officers, stating "it's improper character evidence. It's not relevant and should not be admitted under [Evidence Code section] 352, and [it] denies the defendant due process and [a] fair trial under the state and federal Constitution[s.]" The court noted the objection and stated it was admitting the evidence over the defense objection.

Sheriff's Deputies Brian Sheets, John Kelleher, Pete Martinez and George Sifuentes then testified about their contacts with Guerrero in San Marcos. Sheets identified Guerrero in court as the man he had contact with on March 11, 1993, at an apartment in San Marcos he understood to be Guerrero's residence at the time. Kelleher testified he had contacted a person named Guerrero, who he did not recognize at trial, at about 9:10 p.m. on May 9, 1997, near an intersection in San Marcos. Martinez

recognized Guerrero in court as the man he had contacted at Bradley Park in San Marcos on May 20, 1997. Sifuentes recognized Guerrero in court as the person he had contacted in a car parked in a San Marcos hotel parking lot on October 2, 2001. Investigator Gattegno then testified that the apartment contact was 1.7 miles, or a three-minute drive from the market; the intersection contact was 1.4 miles, or a two and a half minute drive from the market; Bradley Park was a mile from the market and took almost two minutes to drive because of heavy traffic; and the hotel was about 2.6 miles from the market and took five minutes to drive.

Subsequently, outside the jury's presence, defense counsel again voiced his opinion that the evidence of the police contacts was really prohibited character evidence. The court disagreed, stating it would give a limiting instruction that such evidence was admitted only "to show the fact [Guerrero] has been in or has lived in the area near the market at certain times; for no other purpose."

At the close of all evidence, the court read stipulations that on March 26, 2000, Sheriff's deputy Ustoy contacted Guerrero in San Marcos for driving with a taillight out and that at the time of the contacts by Ustoy, Sheets, Kelleher, Martinez and Sifuentes, Guerrero "was not engaged in criminal activity[.]" with the exception of the traffic citation.

On appeal, Guerrero contends the trial court prejudicially abused its discretion when it admitted over his objection the evidence of his earlier police contacts. He specifically argues such evidence which was similar to character evidence should have been excluded under Evidence Code section 352 because its probative value, if any, was

outweighed by the probability its admission would create a substantial danger of undue prejudice. (*People v. Basuta* (2001) 94 Cal.App.4th 370, 386.) Although Guerrero acknowledges that the court attempted to limit the jury's consideration of such evidence to avoid prejudice by permitting the prosecution to only present evidence of the earlier police contacts within a certain distance from the market without reasons for those contacts and by later accepting a stipulation that the contacts did not relate to criminal acts on his part, he asserts the evidence of numerous police contacts still was inflammatory because it suggested he had a disposition to commit crimes or bad acts, and the probative value of such evidence was of no consequence because it was at most collateral to any evidence of guilt. We agree.

While a trial court generally has broad discretion to admit proffered evidence, it has no discretion to admit irrelevant evidence. (Evid. Code, § 350; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) " '[E]vidence which produces only *speculative* inferences is *irrelevant* evidence.' [Citation.]" (*Babbitt, supra*, 45 Cal.3d at p. 682, original italics.)

"Prejudicial evidence ' "uniquely tends to evoke an emotional bias against . . . [one party] as an individual and . . . has very little effect on the issues." [Citation.]' [Citation.] Under Evidence Code section 352, the court must strike a balance between the probative value of the evidence and the danger of prejudice. The court must consider ' "the

relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in [Evidence Code] section 352 for exclusion." [Citation.]' [Citation.]" (*People v. Harlan* (1990) 222 Cal.App.3d 439, 445.)

Moreover, to the extent the proffered evidence consists of other crimes or misconduct, it is admissible only if it " ' . . . [tends to] logically, naturally, and by reasonable inference . . . establish any fact material for the People, or to overcome any material matter sought to be proved by the defense.' " (*People v. Peete* (1946) 28 Cal.2d 306, 315.) Evidence Code section 1101, subdivision (b), codifies this exception to the general rule of inadmissibility by providing for the admission of such evidence "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [the defendant's] disposition to commit such [crimes or bad acts]."

However, even if the proffered evidence or other crimes evidence is relevant to prove one of the facts specified in Evidence Code section 1101, subdivision (b), it must also satisfy the admissibility requirements of Evidence Code section 352, that is, its "probative value [must not be] 'substantially outweighed by the probability that its admission [will] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*), quoting Evid. Code, § 352.)

Generally, the trial court has broad discretion when deciding whether to admit or exclude evidence under Evidence Code sections 352 and 1101, subdivision (b) and its decision will not be disturbed on appeal absent a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) "[A] 'miscarriage of justice' [will] be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836; accord, *People v. Breverman* (1998) 19 Cal.4th 142, 149.) We believe such a case of miscarriage of justice is present here.

In this case, identity of the robber with the gun was the crucial disputed issue at trial. That Guerrero had previously lived in San Marcos and had been contacted by police a number of times within an eight year period in San Marcos, the latest being four months before the robbery, has, as Guerrero notes, "virtually no probative value" on such issue. Although the police contacts were all within 2.6 miles of the market, Guerrero did not dispute that any of those contacts occurred or that he had no knowledge of San Marcos or the areas where those contacts had occurred.³ As there was no dispute about

³ Interestingly, there was no evidence presented that Guerrero had ever been in the market or that it even existed at the time of some of the police contacts because Aguilar had only owned the market for two years before trial and there was no evidence the market existed before that time.

Guerrero's present residence in Vista, a city nearby San Marcos, which is only six miles from the market, or the fact that he had previously lived and had gone to school in San Marcos, the evidence of police contacts simply had no tendency in reason to prove or disprove a disputed fact before the jury for its determination. Nor was the evidence relevant to dispute the credibility of any witness to the commission of the robbery.

To the extent the evidence had any relevance to show Guerrero's knowledge of the area and the opportunity to commit crimes in that area, the court essentially treated it like other crimes evidence without going through the complete analysis necessary to the admission of such evidence. (See *Ewoldt, supra*, 7 Cal.4th at p. 404, quoting Evid. Code, § 352.) None of the earlier contacts was similar to the instant crime to be relevant and admissible for identity. As noted above, Guerrero did not dispute that he was familiar with the San Marcos area. Although the court attempted to avoid confusion and undue consumption of time by restricting the officers' testimony to only the date and location of each contact, as defense counsel pointed out below, the mere mention of police contacts without explaining what those contacts were about left open for the jury to infer Guerrero was contacted by police for numerous criminal or bad acts on his part thereby increasing rather than decreasing the danger of undue prejudice. We do not believe the fact the court later accepted a stipulation that Guerrero "was not engaged in criminal activity" at the time of the police contacts changes this conclusion. The jury could still assume that Guerrero had previously engaged in some bad acts to warrant being contacted by the police.

Further, although the trial court had stated it would admonish the jury about the limited scope for which the police contact evidence could be used when it was admitted, it did not do so. Nor did it specify that such evidence had been admitted for a limited purpose when it gave CALJIC No. 2.09 in final instructions, which also included an instruction (CALJIC No. 17.31) telling the jury that not all instructions may apply.

Thus, under the totality of circumstances of this case, where the outcome of the trial turned on the credibility of the eyewitnesses, whose descriptions of the robber with the gun at the market varied before and at trial and contained many inconsistencies and contradictions, we cannot say the trial court's error in admitting the other police contacts evidence was harmless. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) The devastating effect on Guerrero's right to a fair trial by the admission of such evidence, which was irrelevant to any disputed issue and basically suggested some wrongdoing on his part, to bolster the credibility of the eyewitness identifications of him cannot be overstated. We can only conclude there is a reasonable probability that a result more favorable to Guerrero would have been reached in the absence of the court's error in admitting evidence of the earlier police contacts and reverse his convictions and the true findings.

II

SUFFICIENCY OF THE EVIDENCE

Because Guerrero challenges the sufficiency of the evidence to support his convictions and findings, and insufficiency of the evidence could theoretically preclude

retrial if meritorious,⁴ we have reviewed the facts adduced at trial in full and in the light most favorable to the judgment, drawing all inferences in support of the judgment.

(*People v. Silva* (1988) 45 Cal.3d 604, 625; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) We resolve the issue based upon the entire record and determine whether there is substantial direct or circumstantial evidence of the convicted offenses and findings.

(*People v. Towler* (1982) 31 Cal.3d 105, 117-118; *Johnson, supra*, 26 Cal.3d at p. 577.)

The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusions. (*People v. Arcega* (1982) 32 Cal.3d 504, 518.)

In making our determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. (Evid. Code, § 312.) We simply consider whether " ' any rational trier of fact could have found the essential elements of [Guerrero's crimes and enhancements] beyond a reasonable doubt.' " [Citations.] (*People v. Rich* (1988) 45 Cal.3d 1036, 1081, original italics.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict[s]" we will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

⁴ The United States Supreme Court "has consistently held that the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence." (*Oregon v. Kennedy* (1982) 456 U.S. 667, 676, fn. 6.)

Here, Guerrero does not challenge the sufficiency of the evidence to support the elements of his crimes or enhancements, but only the sufficiency of the evidence identifying him as the person with the gun who committed the robbery at the market. He basically argues that because he presented alibi evidence and the eyewitness identification evidence was shaky, unsubstantial and lacked corroboration, the verdicts must be reversed. Guerrero, however, fails to appreciate that the record before the jury revealed three independent eyewitnesses to the robberies who had had the opportunity to see the gunman's face up close had identified him as the gunman. The testimony of a single eyewitness is sufficient to support a jury's verdict absent some physical impossibility or inherent probability in that evidence. (Evid. Code, § 411; *People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

Guerrero simply has not shown how the eyewitness testimony of the three witnesses (Martinez, Flores or Aguilar) was physically impossible or inherently improbable. As noted above, Guerrero's counsel extensively cross-examined each witness on the accuracy of his identification, pointing out numerous inconsistencies or uncertainties in each witness's earlier identifications to either the police or on the 9-1-1 tape played for the jury. It was the exclusive province of the jury to determine the credibility of the eyewitness testimony.

Moreover, contrary to Guerrero's assertion that the in-court eyewitness identification testimony was not corroborated, each witness gave a similar account of the gunman to Hamerschlag who had separately interviewed them the night of the robbery. In addition, Cruz testified that each of those witnesses separately identified Guerrero as

the gunman in the photo lineup which the trial court had found not to be suggestive. Further, Gutierrez's statements before trial and his in-court testimony were consistent that Guerrero looked like one of the robbers and could be the man with the gun. A jury could reasonably deduce from the totality of the evidence concerning identification that Guerrero was the gunman in the market robbery. Sufficient substantial evidence thus supports the jury's verdicts.

III

REMAINING ISSUES

Although our reversal in this case makes it unnecessary to discuss Guerrero's remaining issues, we note that at the time of the pretrial and renewed trial motions, the trial court's rulings denying the admission of the proposed third party culpability evidence were not abuses of discretion. (See *People v. Hall* (1986) 41 Cal.3d 826, 833.) Although "[t]o be admissible, the third-party evidence . . . need only be capable of raising a reasonable doubt of defendant's guilt[,] . . . evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Ibid.*) At the times Guerrero sought admission of the third party culpability evidence in this case, he did not show directly or circumstantially that the four robberies committed by two other persons in nearby neighboring cities before and after his arrest were so similar to the robberies in this case to infer that the robberies here were committed by those third parties.

Because the entire case is being reversed for evidentiary error, we find it unnecessary to address Guerrero's additional contention the trial court erred in denying his motion for a new trial.

DISPOSITION

The judgment is reversed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.